TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~195~~ 200

SPENCER SMITH, PLAINTIFF IN ERROR,

vs.

HAMILTON J. McCOOL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JANUARY 11, 1869.

For the reargument, three more briefs were filed, viz,

For plfs in error, Jan. 27, 1873

" " " " Feb. 8, "

" deft " " Jan. 31, "

These are not in this library, unless in a lot of duplicates in record story, by inadvertence: an unlikely supposition. Attempts were made to get them.

SUPREME COURT OF THE UNITED STATES.

No. 427.

SPENCER SMITH, PLAINTIFF IN ERROR,

vs.

HAMILTON J. McCOOL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-room in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, district judge of said district, and, in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said circuit court, on Monday the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-eight, in the December term of said court, in the year of our Lord one thousand eight hundred and sixty-seven, and of our independence the ninety-second year.

WILLIAM H. BRADLEY, *Clerk.*

5,967.

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } In ejectment.

NORTHERN DISTRICT OF ILLINOIS, *sct:*

Be it remembered that on the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and sixty-two, came
2 Spencer Smith, plaintiff, by Messrs. Wead and Harding, his attorneys, and filed in the office of the clerk of the circuit court of the United States for said district, at Chicago, in said district, his declaration in ejectment against Hamilton J. McCool, defendant, with a notice and affidavit thereto attached, and also, at the same time, filed his bond for costs in said entitled cause; which said bond, declaration, notice, and affidavit are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

United States circuit court.—October term, A. D. 1862.

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } In ejectment.

We hereby enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and, in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against our property for any costs taxed against him.

3 Dated this 8th day of November, A. D. 1862.

WEAD & HARDING.

(Endorsed:) Filed Nov. 28th, A. D. 1862.
WM. H. BRADLEY, *Clerk.*

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

United States circuit court.—October term, A. D. 1862.

Spencer Smith, who is a citizen of the State of Wisconsin, by Wead

& Harding, his attorneys, complains of Hamilton J. McCool, who is a citizen of the State of Illinois in a plea of trespass and ejectment:

For that, whereas heretofore, to wit, on the 1st day of October, in the year eighteen hundred and sixty-two (A. D. 1862), at and within the county of Warren and State of Illinois, the said plaintiff was possessed as of his own demesne in fee simple of that certain tract or parcel of land, with the appurtenances, situate in the county of Warren, in the said State of Illinois, and described as follows, to wit:

The northeast quarter of section eleven (11), in township ten (10) north, in range one (1) west, which said premises exceed in value the sum of five hundred dollars, and which the said plaintiff claims in fee simple.

4 And the said plaintiff being so possessed thereof, the said defendant, afterwards, to wit, on the same day and year last aforesaid, entered the said premises and ejected the said plaintiff therefrom, and from the time last aforesaid has unlawfully withheld and doth now unlawfully withhold from the said plaintiff the possession thereof, to the damage of the said plaintiff of the sum of five hundred dollars; and therefore he brings suit, etc.

WEAD & HARDING,
Atty's for Plaintiff

To Hamilton J. McCool, the above-named defendants:

You are hereby notified that the declaration, with a copy of which you are now herewith served, and to which this notice is attached, will be filed in the circuit court of the United States for the northern district of Illinois on the fortieth day of the October term, A. D. 1862, and that upon filing the same a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of said rule, and that if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in said declaration.

Dated this 6th day of November, A. D. 1862.

5 WEAD & HARDING,
Attorneys for Plaintiff.

STATE OF ILLINOIS, *County of Warren:*

United States circuit court.—October term, A. D. 1862.

SPENCER SMITH
vs.
HAMILTON J. McCOOL.

David S. Parry, being duly sworn, says that he served the within declaration & notice upon the within-named Hamilton J. McCool, upon said within-described premises, by giving to him, said defendant, a true copy of said declaration & notice this 7th November, A. D. 1862, said defendant being then in possession of said premises; & further saith not.

DAVID S. PARRY.

Subscribed & sworn to before me this 7th Nov., 1862.

WARREN CIRCUIT COURT, ILL'S. SEAL.

WM. LAFERTY,
Clk Circuit Court,
By L. TOURTELLOTT, *Deputy.*

(Endorsed:) Filed November 28th, 1862.

WM. H. BRADLEY, *Clk.*

6 On this day, to wit, the 15th day of December, A. D. 1862, came said defendant, by his attorney, and filed his plea in said entitled cause; which said plea is in the words and figures following, to wit:

Plea.

In he circuit court of the United States for the northern district of Illinois.

SPENCER SMITH
vs.
HAMILTON J. MCCOOL.

And now comes the defendant, by E. W. Hazard, his att'y, and defends the wrong and injury, and says that the plaintiff ought not to have and maintain his said action, because, he says, that he, the defendant, is not guilty of unlawfully withholding from the said plaintiff the premises described in his declaration in manner and form therein set forth; and of this he puts himself upon the country, &c.

E. W. HAZARD,
Att'y for Def't.

(Endorsed:) Filed Dec. 15, '62.

WM. H. BRADLEY, *Clk.*

7 On this day, to wit, the 15th day of May, A. D. 1863, in the adjourned May term of said court, in said year, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
v.
HAMILTON J. MCCOOL. } Ejectment.

This cause, on motion of the plaintiff's attorney, is dismissed at plaintiff's costs. It is thereupon ordered by the court that execution issue therefor.

On this day, to wit, the 18th day of May, in the adjourned May term A. D. 1863, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
v.
HAMILTON J. MCCOOL. } Ejectment.

Now comes the plaintiff, by his attorney, and on motion and by consent of the defendant, by his attorney, the order entered herein on the fifteenth instant dismissing said cause be vacated and set aside, and the cause reinstated upon the docket.

8 On this day, to wit, the 27th day of May, in the adjourned May term, A. D. 1863, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

& Harding, his attorneys, complains of Hamilton J. McCool, who is a citizen of the State of Illinois in a plea of trespass and ejectment:

For that, whereas heretofore, to wit, on the 1st day of October, in the year eighteen hundred and sixty-two (A. D. 1862), at and within the county of Warren and State of Illinois, the said plaintiff was possessed as of his own demesne in fee simple of that certain tract or parcel of land, with the appurtenances, situate in the county of Warren, in the said State of Illinois, and described as follows, to wit:

The northeast quarter of section eleven (11), in township ten (10) north, in range one (1) west, which said premises exceed in value the sum of five hundred dollars, and which the said plaintiff claims in fee simple.

4 And the said plaintiff being so possessed thereof, the said defendant, afterwards, to wit, on the same day and year last aforesaid, entered the said premises and ejected the said plaintiff therefrom, and from the time last aforesaid has unlawfully withheld and doth now unlawfully withhold from the said plaintiff the possession thereof, to the damage of the said plaintiff of the sum of five hundred dollars; and therefore he brings suit, etc.

WEAD & HARDING,
Atty's for Plaintiff

To Hamilton J. McCool, the above-named defendants:

You are hereby notified that the declaration, with a copy of which you are now herewith served, and to which this notice is attached, will be filed in the circuit court of the United States for the northern district of Illinois on the fortieth day of the October term, A. D. 1862, and that upon filing the same a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of said rule, and that if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in said declaration.

Dated this 6th day of November, A. D. 1862.

5 WEAD & HARDING,
Attorneys for Plaintiff.

STATE OF ILLINOIS, *County of Warren:*

United States circuit court.—October term, A. D. 1862.

SPENCER SMITH
vs.
HAMILTON J. MCCOOL.

David S. Parry, being duly sworn, says that he served the within declaration & notice upon the within-named Hamilton J. McCool, upon said within-described premises, by giving to him, said defendant, a true copy of said declaration & notice this 7th November, A. D. 1862, said defendant being then in possession of said premises; & further saith not.

DAVID S. PARRY.

Subscribed & sworn to before me this 7th Nov., 1862.

WARREN CIRCUIT COURT, ILL'S. SEAL.

WM. LAFERTY,
Clk Circuit Court,
By L. TOURTELLOTT, *Deputy.*

(Endorsed:) Filed November 28th, 1862.

WM. H. BRADLEY, *Clk.*

6 On this day, to wit, the 15th day of December, A. D. 1862, came said defendant, by his attorney, and filed his plea in said entitled cause; which said plea is in the words and figures following, to wit:

Plea.

In he circuit court of the United States for the northern district of Illinois.

SPENCER SMITH
vs.
HAMILTON J. MCCOOL.

And now comes the defendant, by E. W. Hazard, his att'y, and defends the wrong and injury, and says that the plaintiff ought not to have and maintain his said action, because, he says, that he, the defendant, is not guilty of unlawfully withholding from the said plaintiff the premises described in his declaration in manner and form therein set forth; and of this he puts himself upon the country, &c.

E. W. HAZARD,
Att'y for Def't.

(Endorsed:) Filed Dec. 15, '62.

WM. H. BRADLEY, *Clk.*

7 On this day, to wit, the 15th day of May, A. D. 1863, in the adjourned May term of said court, in said year, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
v.
HAMILTON J. MCCOOL. } Ejectment.

This cause, on motion of the plaintiff's attorney, is dismissed at plaintiff's costs. It is thereupon ordered by the court that execution issue therefor.

On this day, to wit, the 18th day of May, in the adjourned May term A. D. 1863, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
v.
HAMILTON J. MCCOOL. } Ejectment.

Now comes the plaintiff, by his attorney, and on motion and by consent of the defendant, by his attorney, the order entered herein on the fifteenth instant dismissing said cause be vacated and set aside, and the cause reinstated upon the docket.

8 On this day, to wit, the 27th day of May, in the adjourned May term, A. D. 1863, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
v.
HAMILTON J. MCCOOL. } Ejectment.

Now come the parties, by their attorneys, and by agreement it is ordered that the depositions heretofore taken and filed in a former case between the same parties be used on the trial of this cause, and upon issue joined come a jury of good and lawful men, to wit: M. B. Derrick, Lorenzo Wood, John M. Brown, William Fowler, P. P. Scarritt, J. B. Peterson, E. B. Kingsley, Levi Gibson, T. B. Farnsworth, O. B. Ayers, James Scott, and Adam Bohn, who are all duly elected, tried, and sworn to well and truly try said issue, after hearing the evidence and the instructions of the court, return into court the following verdict, to wit: We, the jury, find the defendant guilty of unlawfully withholding from the possession of the plaintiff the real estate and premises described in the plaintiff's declaration as follows, to wit:

That certain tract or parcel of land, with the appurtenances, situate in the county of Warren, in the said State of Illinois, and described as follows, to wit: The northeast quarter of section eleven (11), in township ten (10) north, range one (1) west. We also find the estate established in the plaintiff on the trial to be an estate in fee simple, and assess his damages to the sum of one cent.

And thereupon the defendant, by his attorney, moves the court for a new trial herein.

On this day, to wit, the fifth day of October, in the adjourned October term, A. D. 1865, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
v.
HAMILTON J. MCCOOL. } Ejectment.

The court having considered and being now fully advised upon the motion of the defendant, heretofore entered by his attorney, for a new trial of this cause, overrules the same.

It is thereupon considered and adjudged by the court that the said plaintiff do have and recover of and from the said defendant possession of the real estate and premises aforesaid described, according to the force, form, and effect of his said recovery, and that he have a writ of possession therefor, and that he also have and recover of the said defendant the said sum of one cent, his damages so as aforesaid assessed, together with his costs and charges by him about his suit in this behalf expended, amounting to the sum of thirty-six dollars and eighty cents, and that he have execution therefor.

On this day, to wit, the 12th day of October, in the adjourned October term, A. D. 1865, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH,
vs.
HAMILTON J. MCCOOL. } Ejectment.

Now comes the defendant, by E. W. Hazard, esq., his attorney, and moves the court to set aside and vacate the judgment entered herein on the fifth day of October instant, and for a new trial of the same

under the statute; and it appearing to the court that all the taxed costs in this cause have been paid by the defendant, it is thereupon ordered by the court that the said judgment be set aside and vacated, and a new trial of the same awarded.

11 On this day, to wit, the 31st day of May, in the adjourned May term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } Ejectment.

Now come the parties, by their attorney, and upon issue joined thereupon come a jury of good and lawful men, to wit: Alvin Judd, William Petty, W. A. Little, James H. Rees, Harmon Straw, Smith M. Cleavy, Sylvester Remington, sr., Samuel Springer, F. A. Weir, C. B. Smith, Abraham Howard, and Michael Markley, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing the evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the 1st day of June, in the adjourned May term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } Ejectment.

12 Now come again the parties, by their attorneys, and now come also the jury in this behalf empanneled and sworn; and after hearing the conclusion of arguments of counsel, and receiving the instructions of the court, the jury retire to consider of their verdict, and after a short absence the jury return into court the following verdict, to wit: We, the jury, find the defendant not guilty. It is thereupon considered and adjudged by the court that the said defendant be dismissed, and that he go hence without day, and that he have and recover of the said plaintiff his costs and charges by him about his defence in this behalf expended, amounting to the sum of thirty-one dollars and forty-five cents, and that he have execution therefor.

On this day, to wit, the 11th day of June, in the adjourned May term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } Ejectment.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the plaintiff to vacate the judgment entered
13 herein on the first of June instant, and for a new trial of this cause; and after hearing the arguments of counsel the court, not being fully advised upon said motion, takes the same under advisement.

SPENCER SMITH
v.
HAMILTON J. MCCOOL. } Ejectment.

Now come the parties, by their attorneys, and by agreement it is ordered that the depositions heretofore taken and filed in a former case between the same parties be used on the trial of this cause, and upon issue joined come a jury of good and lawful men, to wit: M. B. Derrick, Lorenzo Wood, John M. Brown, William Fowler, P. P. Scarritt, J. B. Peterson, E. B. Kingsley, Levi Gibson, T. B. Farnsworth, O. B. Ayers, James Scott, and Adam Bohn, who are all duly elected, tried, and sworn to well and truly try said issue, after hearing the evidence and the instructions of the court, return into court the following verdict, to wit: We, the jury, find the defendant guilty of unlawfully withholding from the possession of the plaintiff the real estate and premises described in the plaintiff's declaration as follows, to wit:

That certain tract or parcel of land, with the appurtenances, situate in the county of Warren, in the said State of Illinois, and described as follows, to wit: The northeast quarter of section eleven (11), in township ten (10) north, range one (1) west. We also find the estate established in the plaintiff on the trial to be an estate in fee simple, and assess his damages to the sum of one cent.

And thereupon the defendant, by his attorney, moves the court for a new trial herein.

On this day, to wit, the fifth day of October, in the adjourned October term, A. D. 1865, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
v.
HAMILTON J. MCCOOL. } Ejectment.

The court having considered and being now fully advised upon the motion of the defendant, heretofore entered by his attorney, for a new trial of this cause, overrules the same.

It is thereupon considered and adjudged by the court that the said plaintiff do have and recover of and from the said defendant possession of the real estate and premises aforesaid described, according to the force, form, and effect of his said recovery, and that he have a writ of possession therefor, and that he also have and recover of the said defendant the said sum of one cent, his damages so as aforesaid assessed, together with his costs and charges by him about his suit in this behalf expended, amounting to the sum of thirty-six dollars and eighty cents, and that he have execution therefor.

On this day, to wit, the 12th day of October, in the adjourned October term, A. D. 1865, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH,
vs.
HAMILTON J. MCCOOL. } Ejectment.

Now comes the defendant, by E. W. Hazard, esq., his attorney, and moves the court to set aside and vacate the judgment entered herein on the fifth day of October instant, and for a new trial of the same

under the statute; and it appearing to the court that all the taxed costs in this cause have been paid by the defendant, it is thereupon ordered by the court that the said judgment be set aside and vacated, and a new trial of the same awarded.

11 On this day, to wit, the 31st day of May, in the adjourned May term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } Ejectment.

Now come the parties, by their attorney, and upon issue joined thereupon come a jury of good and lawful men, to wit: Alvin Judd, William Petty, W. A. Little, James H. Rees, Harmon Straw, Smith M. Cleavy, Sylvester Remington, sr., Samuel Springer, F. A. Weir, C. B. Smith, Abraham Howard, and Michael Markley, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing the evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until tomorrow morning.

On this day, to wit, the 1st day of June, in the adjourned May term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } Ejectment.

12 Now come again the parties, by their attorneys, and now come also the jury in this behalf empanneled and sworn; and after hearing the conclusion of arguments of counsel, and receiving the instructions of the court, the jury retire to consider of their verdict, and after a short absence the jury return into court the following verdict, to wit: We, the jury, find the defendant not guilty. It is thereupon considered and adjudged by the court that the said defendant be dismissed, and that he go hence without day, and that he have and recover of the said plaintiff his costs and charges by him about his defence in this behalf expended, amounting to the sum of thirty-one dollars and forty-five cents, and that he have execution therefor.

On this day, to wit, the 11th day of June, in the adjourned May term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } Ejectment.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the plaintiff to vacate the judgment entered
13 herein on the first of June instant, and for a new trial of this cause; and after hearing the arguments of counsel the court, not being fully advised upon said motion, takes the same under advisement.

On this day, to wit, the eighteenth day of June, in the adjourned May term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } Ejectment.

The court having considered, and being now fully advised upon the motion of the plaintiff, heretofore entered, to vacate the judgment rendered in this cause on the first day of June instant, and for a new trial of the same, overrules said motion.

On this day, to wit, the 28th day of July, in the July term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } Ejectment.

14 Now comes the plaintiff, by George F. Harding, esq., his attorney, who moves the court to set aside and vacate the judgment rendered herein on the first day of June last, and for a new trial of this cause under the statute; and it appearing to the court that all the taxed costs have been paid by the plaintiff, it is thereupon ordered by the court that said judgment be set aside and vacated, the cause reinstated upon the docket, and a new trial of the same awarded.

And on further motion of the plaintiff's attorney, leave is given him by the court to cross-examine the plaintiff herein, whose deposition de bene esse has been taken on the part of the defendant and filed herein, upon giving notice to the defendant, or his attorney, of the time and place of taking the same.

On this day, to wit, the 1st day of December, in the adjourned Octotober term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } Law ejectment.

On application of the plaintiff, by Wead & Harding, his attorneys, leave is given by the court to affix and cancel a revenue stamp
15 to the certificate attached to the deposition of Spencer Smith, on file herein.

On this day, to wit, the 14th day of February, A. D. 1867, in the December term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } Ejectment.

On motion of the plaintiff, by George F. Harding, esq., his attorney, leave is given him by the court to cross-examine Sophia Rand, a witness whose deposition de bene esse has been taken on the part of the defend-

ant and filed herein, by giving notice to the defendant, or his attorney, of the time and place of taking such cross-examination.

On this day, to wit, the 24th day of January, A. D. 1868, in the December term, A. D. 1867, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } Ejectment.

16 Now come the parties, by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit: Isaiah Williams, Robert Meeder, H. A. Rivers, H. H. Hildreth, Warren Hill, Cornelius Guild, J. H. Bradley, Morgan L. Keith, A. C. Van Brunt, J. R. Walker, E. H. Brookner, and Reuben Taylor, who were all duly elected, tried, and sworn well and truly to try said issue; and after hearing the opening statements of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the 25th day of January, A. D. 1868, in the December term, A. D. 1867, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } Ejectment.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empanneled and sworn; and after hearing the evidence and the instructions of the court, the jury returned into court the following verdict, to wit: We, the jury, find the defendant not guilty. And thereupon the plaintiff, by his attorney, moves the court for a new trial herein.

17 On this day, to wit, the 24th day of February, A. D. 1868, in the December term, A. D. 1867, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } Ejectment.

Now comes the defendant, by his attorney, and the motion of the plaintiff, heretofore entered herein, for a new trial of this cause coming on to be heard, and the plaintiff failing to appear to urge said motion, the same is overruled by the court.

It is thereupon considered and adjudged by the court that the said defendant be dismissed, and that he go hence without day, and that he have and recover of the plaintiff his costs and charges by him about his defence in this behalf expended, amounting to the sum of seventy-eight dollars and fifty cents, and that he have execution therefor.

18 On the trial of said cause, the following exceptions were taken, and were allowed by the court, and are in the words and figures following, to wit:

Bill of exceptions.

United States circuit court, northern district of Illinois.—December term, A. D. 1867.

SPENCER SMITH
vs.
HAMILTON J. MCCOOL.

Be it remembered that on the trial of said above-entitled case in the above-entitled court at the above-entitled term, the said plaintiff, to maintain the issue upon his part, offered in evidence the special verdict found in the case between said parties on February 9th, A. D. 1859, in said above-entitled court, and the record of said case, including the pleadings, bill of exceptions, and payments rendered in said court above entitled therein; and also the mandate of the Supreme Court of the United States; and in connection therewith the patent from the United States government to Alonzo Redman, dated December 7, 1818, conveying said land described in said declaration herein; and the deed from Sophia Rand to Levi F. Stevens, dated June 23, 1854, purporting
19 to convey the said land; and the deed from Levi F. Stevens to the plaintiff, purporting to convey said land, & dated April 21st, A. D. 1855; which said record, mandate, patent, and deeds, are respectively in the words and figures following, to wit:

20 Supreme Court of the United States.—No. 161.

HAMILTON J. MCCOOL, plaintiff in error,
vs.
SPENCER SMITH.

In error to the circuit court of the United States for the northern district of Illinois.

Supreme Court of the United States.—No. 245.

HAMILTON J. MCCOOL, plaintiff in error,
vs.
SPENCER SMITH.

In error to the circuit court of the United States for the northern district of Illinois.

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1 *Hamilton J. McCool* vs. *Spencer Smith.*

THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the United States court-room in the city of Chicago, before the Honorable Thomas Drummond, judge of the district court, sitting pro tempore in the absence of the Honorable John McLean, one of the justices of the Supreme Court of the United States, and judge of said district, and on Saturday, the fourteenth day of July, eighteen hundred and sixty, and of the independence of the United States the eighty-fifth year.

WM. H. BRADLEY, *Clerk.*

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } In ejectment.

Be it remembered that, on the second day of July, eighteen hundred and fifty-five, said plaintiff, by Wead and Harding, his attorneys, came and filed his declaration and notice in ejectment, together with their bond for costs; which read in the words and figures following, to wit:

Declaration and notice.

UNITED STATES OF AMERICA, *State of Illinois, ss:*

Circuit court of the United States of the northern district of the State of Illinois, at Chicago, July term, A. D. 1855.

Hamilton J. McCool, who is a citizen of the State of Illinois, was summoned to answer unto Spencer Smith, who is a citizen of the State of Missouri, of a plea of trespass and ejectment, for that, whereas heretofore, to wit, on the first day of May, in the year eighteen hundred and fifty-five, at and within the county of Warren, in the State of Illinois, in the northern district of the circuit court of the United States, for said State, the said plaintiff was possessed, as of his own demesne in fee simple, of a certain tract of land situate at and within the said county, district, and State, and known as the northeast quarter of section eleven, in township ten northern, range one west of the fourth principal meridian, which land exceeds in value five hundred dollars, and the said plaintiff, being then and there possessed of said premises, he, the said defendant, then afterward, to wit, on the day and year aforesaid, entered into the said described premises, and from the time last aforesaid has unlawfully withheld and does now

2 *Hamilton J. McCool* vs. *Spencer Smith*

unlawfully withhold from the said plaintiff the possession of the said premises, to the damage of the said plaintiff the sum of one hundred dollars; and therefor he brings suit, &c.

WEAD & HARDING,
Attorneys for Plaintiff.

To Mr. Hamilton J. McCool:

You are hereby notified that the declaration, with a copy of which you are now herewith served, and to which copy this notice is subjoined, will be filed in the circuit court of the United States for the northern district of Illinois, at Chicago, in said State of Illinois, on the first day of the next July term thereof, A. D. 1855, or as soon thereafter as counsel may be heard, and that upon filing the same a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of said rule, and that if you neglect so to appear and plead a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in the said declaration.

Dated this 1st day of May, A. D. 1855.

WEAD & HARDING,
Att'ys for Plaintiff.

UNITED STATES OF AMERICA, *State of Illinois, ss:*

Circuit court of the United States for the northern district of the State of Illinois, at Chicago, July term, A. D. 1855.

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } In ejectment.

Stipulation for costs.

We do hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party, or to any of the officers of this court, in pursuance of the laws of this State.

Dated this 1st day of May, A. D. 1855.

WEAD & HARDING.

STATE OF ILLINOIS, *Warren County, ss:*

Circuit court of the United States for the northern district in the State of Illinois, at Chicago, July term, A. D. 1855.

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } Ejectment.

James McCoy, being duly sworn, deposes and says, that he did,

3 *Hamilton J. McCool* vs. *Spencer Smith.*

on the 4th day of May, A. D. 1855, personally served Hamilton J. McCool, the defendant in this suit, who is the actual occupant of the premises for which this action was brought, with a true copy of the declaration hereunto annexed, and also a true copy of the notice in writing to the said declaration subjoined, and likewise hereunto annexed; and further this deponent saith not.

JAMES MCCOY, *Sheriff.*

Subscribed and sworn to before me this (11th) eleventh day of May, A. D. 1855.

[SEAL.] WM. BILLINGS, *Clerk.*

(Endorsed:) Filed July 2d, 1855.

WM. H. BRADLEY, *Clerk.*

And afterwards, to wit, on the second day of July, eighteen hundred and fifty-five, of the July term of said court for said year, is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } Ejectment.

Rule to plead.

Now comes the plaintiff, by his attorney, and files his declaration in ejectment, together with a notice thereto attached, and also an affidavit of due service of a true copy of said declaration and notice upon the defendant; and on motion of the plaintiff, by his attorney, it is ordered by the court that the cause be docketed, and that the defendant plead thereto within twenty days, or that his default be entered.

And afterwards, to wit, on the fourth day of July, eighteen hundred and fifty-five, the said defendant, by Williams, Lawrence & Williams, his attorneys, comes and enters his appearance, and files the following plea, to wit:

HAMILTON J. MCCOOL
ads.
SPENCER SMITH.

Plea.

And the said defendant comes, &c., and says that he is not guilty of withholding the possession of the said premises from the said , in manner and form as the said plaintiff has in his declaratiom complained against him; and of this he puts himself upon the country, &c.

WILLIAMS, LAWRENCE & WILLIAMS.

(Endorsed:) Filed July 4, 1855.

WM. H. BRADLEY, *Clerk.*

4 *Hamilton J. McCool* vs. *Spencer Smith.*

And afterwards, to wit, on Wednesday, the twenty-third day of July, eighteen hundred and fifty-six, of the July term of said court, among the record of the proceedings of said court in said cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } In ejectment.

Order of continuance.

By agreement of the parties, by their attorneys,
It is ordered by the court that this cause be continued until the next term of this court.

And afterwards, to wit, on the tenth day of February, eighteen hundred and fifty-seven, of the December term of said court, for the year eighteen hundred and fifty-six, in the record of the proceedings of said court in said cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } Ejectment.

Trial and finding of jury.

Now comes the defendant, by A. Williams, esq., his attorney, and moves the court that a jury be empanneled to try the issue joined upon the plea of the defendant, heretofore filed by his attorney. It is thereupon considered by the court that a jury come to try said issue, and thereupon come a jury of good and lawful men, to wit: John A. Jamison, E. Van Buren, John S. Wilcox, George Scoville, E. W. Smith, Franklin Webster, Hiram L. Lewis, M. Andrich, William D. Cassin, P. W. Peckham, F. M. Lathrop, and Thomas Hoyne, who were duly elected, tried, and sworn; and after hearing the evidence, the jury returned into court the following verdict, to wit: "We, the jury, find the defendant not guilty of unlawfully withholding from the possession of the plaintiff the real estate and premises described in his declaration."

It is thereupon considered and adjudged by the court that the defendant have and recover of the plaintiff his costs by him about his defence in this behalf expended, amounting to the sum of dollars and cents, and that he have an execution therefor.

And afterwards, to wit, on Monday, the thirteenth day of July, eighteen hundred and fifty-seven, of the July term of said court,

5 *Hamilton J. McCool* vs. *Spencer Smith.*

for said year, in the record of the proceedings of said court in said cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } Ejectment.

Motion for a new trial.

Now come the parties, by their attorneys, and now come on to be heard the motion of the defendant, heretofore filed, for a new trial herein, which, after argument, is taken under advisement by the court.

And afterwards, to wit, on Wednesday, the fifteenth day of July, eighteen hundred and fifty-seven, of the July term of said court aforesaid, in the record of the proceedings of said court in said cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } Ejectment.

Order granting new trial.

The court having fully considered, and being now sufficiently advised upon the motion heretofore made by the defendant for a new trial, herein sustains the same.

And afterwards, to wit, on Thursday, the fifteenth day of October, eighteen hundred and fifty-seven, of the October term of said court, for the year eighteen hundred and fifty-seven, in the record of the proceedings of said court in said cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } Ejectment.

Order dismissing cause.

Now comes the said defendant, by his attorney, and the plaintiff, being now three times solemnly called, comes not, but makes default. It is thereupon considered by the court, on motion of the defendant, by his attorney, that this cause be dismissed, at the costs of the plaintiff, for want of prosecution, and that the defendant have and recover of the plantiff his costs by him about his suit in this behalf expended, amounting to the same of dollars and cents, and have execution therefor.

6 *Hamilton J. McCool* vs. *Spencer Smith.*

Afterwards, to wit, on Tuesday, the twelfth day of January, eighteen hundred and fifty-eight, of the December term, eighteen hundred and fifty-seven of said court, in the record of the proceedings of said court in said cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } Ejectment.

Order dismissal set aside.

By agreement of the parties, by their attorneys, as per stipulation filed, it is ordered by the court that the order of dismissal entered in this cause on the fifteenth day of October, A. D. 1857, be set aside and vacated, and the cause reinstated upon the docket, and that the plaintiff pay all the costs which have accrued herein up to this time, and that execution issue therefor.

And afterwards, to wit, on Friday, the fifteenth day of January, eighteen hundred and fifty-eight, of the December term of said court aforesaid, in the record of the proceedings of said court in said cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. McCOOL. } Ejectment.

Order of continuance.

By agreement of the parties, by their attorneys, it is ordered by the court that this cause be continued until the next July term.

And afterwards, to wit, on Thursday, January twentieth, eighteen hundred and fifty-nine, of the December term of said court, for the year eighteen hundred and fifty-eight, in the record of the proceedings of said cause in said court is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } Ejectment.

Trial.

Now come the parties, by their respective attorneys, and, upon issue joined thereupon, come a jury of good and lawful men, to wit: Edward Matthews, Joseph P. Burner, Matthew Taggart, Robert Atkinson, Darwin Wilber, James S. Speed, R. W. Carson, Edward B. Hanna, William Bacon, Robert H. Howe,

Daniel Mullins, and James R. White, who were duly elected, tried, and sworn well and truly to try the issue herein; and after hearing the evidence and agreements of counsel, and receiving instructions from the court, the jury retired to consider of their verdict.

And afterwards, to wit, on Wednesday, the ninth day of February, eighteen hundred and fifty-nine, of the December term of said court aforesaid, in the record of the proceedings of said court in said cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } Ejectment.

Verdict of the jury.

The further trial of this cause having been postponed by agreement of the parties, by their attorneys, and now come again the parties, by their attorneys, and now come the jury hertofore empanneled in this cause, and return into court the following verdict, to wit: We, the jury, find the defendant guilty of unlawfully withholding from the possession of the plaintiff the real estate and premises described in the plaintiff's declaration, as follows, to wit: A certain tract of land situate at and within the county of Warren, in the State and northern district of Illinois, and known as the northeast quarter of section eleven, in township ten north, in range one west of the fourth principal meridian. We further find the estate established in the plaintiff on trial to be an estate in fee simple, and assess his damages at the sum of one cent. Whereupon the defendant, by his attorney, moves the court for a new trial herein.

And afterwards, to wit, on Saturday, the seventeenth day of July, eighteen hundred and sixty, of the July term of said court for the year aforesaid, in the record of the proceedings of said court in said cause is the following entry, to wit:

SPENCER SMITH
vs.
HAMILTON J. MCCOOL. } Ejectment.

Motion for new trial overruled, and judgment entry.

The court having fully considered, and being now fully advised upon the motion of the defendant, heretofore made, for a new trial of this cause, overrules said motion.

It is thereupon considered by the court that the plaintiff have and recover of the defendant possession of the said described premises, according to the form, force, and effect of his said re-

covery, and that he have a writ of possession therefor; and that he also have and recover of the defendant the said sum of one cent, his damages so as aforesaid assessed, together with his costs and charges by him about his suit in this behalf expended, amounting to the sum of thirty-six dollars and thirty-five cents, and that he have execution therefor.

And afterwards, to wit, on the seventeenth day of July, eighteen hundred and sixty, the following bill of exceptions, taken in said cause, was filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, and is in the words and figures following, to wit:

SPENCER SMITH
vs.
HAMILTON J. McCOOL.

Bill of exceptions.

Be it remembered that on the trial of this case, the jury empanneled herein found the following special verdict as to the facts: We, the jury, find that the N. E. 11, 10 N., 1 W., the land mentioned in the said declaration, was, on the 7th day of June, 1818, duly granted by the United States to Alonzo Redman for his military services in the late war between the United States and Great Britain; that said Redman was the illegitimate son of Polly Norris; that said Polly Norris had three other illegitimate children, named Eleanor Fogg, Joseph Melcher, and Sophia Norton; that Eleanor Fogg died without issue in the year 1824; that Joseph Melcher died without issue in the year 1814; that Alonzo Redman died without issue in the year 1825; that Polly Norris died without any other issue than as above stated in the year 1837; that Sophia Norton married Reuben Rand in the year 1816; that Reuben Rand died in June, 1853; that Sophia Rand, on the 23d day of June, 1854, by her quit-claim deed of that date duly executed, conveyed said land to one Levi F. Stevens; that said Stevens, on the 21st day of April, 1855, by his quit-claim deed of that date, duly conveyed said land to Spencer Smith, the plaintiff.

That the general assembly of the State of Illinois passed an act entitled An act to amend an act concerning the descent of real property in this State, approved February 12, 1853, which act was approved by the governor on the 16th day of February, 1857; which act is in the words and figures following, viz:

"Section 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, that in all cases where any person shall have died leaving any real property, before the passage of the act to which this is an amendment, which, by the provisions of the act to which this is an amend-

ment, would have descended to any illegitimate child or children, such child or children shall be deemed and adjudged to be the owner of such

real property the same as if such act had been in force at the time of such death, unless such property shall have been proceeded against and the title thereto vested in the State, or other persons, under the law of this State concerning escheats.

"Section 2. In all such cases hereinbefore specified, where any such illegitimate child or children shall have sold and conveyed such real property by deed duly executed, or where the same would have descended by the provisions of the act to which this is an amendment, and shall have been conveyed by deed by the person to whom the same would have descended, then such conveyances shall vest the same title thereto in the grantee, as by this act is vested in such illegitimate child from the date of such deed, and in all actions and courts, such grantee shall be deemed to be the owner of such real property from the time of the date of the conveyance.

"Section 3. This act shall be in force from and after its passage."

That said lands have never been proceeded against, and the title thereto vested in the State, or other persons, under the law of this State concerning escheats.

We further find that John Brown, collector of taxes in and for the county of Warren, and State of Illinois, did, on the 25th day of May, 1840, sell said land to Isaac Murphy for the taxes due to the State and county aforesaid upon said land for the year 1839, and that he did, on the 9th day of September, 1843, in pursuance of said sale, by deed of that date convey said land to the said Murphy; that said collector, in making such sale and conveyance, did not comply with the law authorising the sale of lands for taxes, and that said deed was for that reason invalid as a conveyance of the legal title; that said Murphy, claiming said land in good faith, under said deed, improved, occupied, and cultivated the same, and paid all the taxes assessed thereon for and during the years 1843, 1844, 1845, and 1846; that said Murphy, on the 7th day of April, 1847, by his deed of that date, conveyed the said land to Hamilton J. McCool, the defendant, who immediately thereafter took possession thereof, and has been in the actual possession thereof ever since, claiming the same in good faith, under said conveyances, and that he has paid all the taxes assessed upon said land for and during the years 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, and 1856; that the taxes so paid to the said State and county, by the said Murphy and McCool, amount to the sum of one hundred and nine dollars. If from these facts the court is of the opinion that the plaintiff is entitled to recover, &c., then we find for the plaintiff, and that said plaintiff is the owner of the land in fee simple,

and assess his damages at one cent; otherwise we find for the defendant.

And the court being of opinion, under the facts as found by the jury, that the plaintiff was entitled to recover, the verdict of the jury was rendered in conformity with such opinion of the court, as entered of record February 9th, 1859; to which opinion of the court upon the law of the case, under the facts as found by the jury, the defendant then and there excepted.

Exceptions allowed February 9, 1859.

THOMAS DRUMMOND. [SEAL.]

(Endorsed:) Filed July 17, 1860.

WM. H. BRADLEY, *Clerk.*

And afterwards, to wit, on the seventeenth day of July, eighteen hundred and sixty, the said defendant sued out of the clerk's office of the court aforesaid a writ of error in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Writ of error.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the records and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you between Spencer Smith, plaintiff, and Hamilton J. McCool, defendant, a manifest error hath happened to the great damage of the said Hamilton J. McCool, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, this seventeenth day

11 *Hamilton J. McCool* vs. *Spencer Smith.*

of July, in the year of our Lord one thousand eight hundred and sixty, and of independence the eighty-fifth year.

[L. S.] WILLIAM H. BRADLEY, *Clerk.*

Endorsed: Filed July 17, 1860.

WILLIAM H. BRADLEY, *Clerk.*

And afterwards, to wit, on the twentieth day of July, eighteen hundred and sixty, the following appeal bond was filed in the clerk's office of said court aforesaid, and reads as follows, to wit:

Bond in appeal.

Know all men by these presents, that we, Hamilton J. McCool, Timothy Moshier, and Archibald Williams, are held and firmly bound unto Spencer Smith in the penal sum of one thousand dollars, to be paid to the said Spencer Smith, and to his executors and administrators; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. In witness whereof, we have hereunto signed our names and set our seals this 20th day of July, 1860.

Provided, however, and this obligation is upon the express condition, that, whereas the above-named Hamilton J. McCool has prosecuted a

writ of error to the Supreme Court of the United States to reverse a certain judgment rendered by the circuit court of the United States in and for the northern district of Illinois, at the July term thereof, A. D. 1860, in favor of said Spencer Smith, and against said Hamilton J. McCool; now, therefore, the condition of this obligation is such, that if the above-named Hamilton J. McCool shall prosecute his said writ of error to effect, and shall pay all costs if he shall fail to make good his plea, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

H. J. McCOOL. [SEAL.]
TIMOTHY MOSHIER. [SEAL.]
ARCHIBALD WILLIAMS. [SEAL.]

Signed, sealed, and delivered in presence of—
JOSIAH GALE.

Approved:

THOMAS DRUMMOND.

And afterwards, on the third day of August, eighteen hundred and sixty, a citation in said cause was filed in the office of the clerk of said court aforesaid, and reads in the words and figures following, to wit:

12 *Hamilton J. McCool vs. Spencer Smith.*

UNITED STATES OF AMERICA, *ss:*

To Spencer Smith, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Hamilton J. McCool is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas Drummond, one of the justices of said court, this 19th day of July, A. D. 1860.

[SEAL.] THOMAS DRUMMOND.

STATE OF ILLINOIS:

PEORIA, *July 22d*, 1860.

I accept service of the within citation.

H. M. WEED,
Attorney for Spencer Smith.

(Endorsed:) Filed August 3d, 1860.

WM. H. BRADLEY, *Clerk.*

Clerk's certificate.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court for the United States for the northern district of Illinois, do hereby certify that the above and foregoing is a true and complete record of the record and proceeding

had in the cause wherein Spencer Smith was plaintiff, and Hamilton J. McCool is defendant, as the same appears from the records of said court now on file in my office, and remaining of custody therein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago, this 11th day of October, A. D. 1860, and of the independence of the United States the 85th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

$8 00 paid by A. Williams for this record.

WM. H. BRADLEY, *Clerk.*

13 *Hamilton J. McCool vs. Spencer Smith.*

Assignment of errors.

HAMILTON J. McCOOL
vs.
SPENCER SMITH.

And the said plaintiff, by his attorney, comes and says that in the record and proceedings herein manifest error hath intervened in this:

1st. That the court rendered judgment in favor of the defendant in error against the plaintiff in error, when, by the law of the land, it should have been in favor of the plaintiff and against the defendant.

2d. The court erred in deciding that the said defendant was entitled to recover on the special verdict found by the jury.

3d. The court erred in instructing the jury to find for the said defendant.

For which and other errors, apparent on the record herein, the said plaintiff prays that the said judgment may be reversed.

A. WILLIAMS,
Attorney for Plaintiff.

20 *Mandate.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the northern district of Illinois, greeting:

[SEAL OF THE SUPREME COURT OF THE UNITED STATES.]

Whereas, lately, in the circuit court of the United States for the northern district of Illinois, before you, or some of you, in a cause between Spencer Smith, plaintiff, and Hamilton J. McCool, defendant, the judgment of the said circuit court was in the following words, to wit: "It is thereupon considered by the court that the plaintiff have and recover of the defendant possession of the said described premises, according to the form, force, and effect of his said recovery, and that he have a writ of possession therefor, and that he also have and recover of the defendant the said sum of one cent, his damages, so as aforesaid assessed, together with his costs and charges by him about his suit in this behalf expended, amounting to the sum of thirty-six dollars and thirty-five cents, and he have execution therefor," as by the inspection of the transcript of the record of the said circuit court, which was
21 brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and sixty one, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was signed by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this case be, and the same is hereby, reversed, with costs, and that the said defendant, Hamilton J. M. McCool, recover of the said plaintiff fifty-nine dollars and fifty-five cents, for his costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court, with directions to enter a judgment for the defendant upon the special verdict. 24 March.

You, therefore, are hereby commanded that such execution & further proceedings be had in said cause, in conformity to the opinion and judgment of this court, as, according to right and justice and the laws
22 of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Honorable Roger B. Taney, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-one.

Costs of defendant:

Clerk	$39 55
Attorney	20 00
	59 55

Taxed by

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

(Endorsed:) Filed July 18th, 1862.

WM. H. BRADLEY, *Clk.*

Patent.

[Militi forti et fideli.]

James Monroe, President of the United States of America, to all to whom these presents shall come, greeting:

Know ye that, in pursuance of the acts of Congress appropriating and granting land to the late army of the United States, passed on and since the sixth day of May, 1812, Alonzo Redman having deposited in the General Land Office a warrant in his favor numbered 12,386, there is granted unto the said Alonzo Redman, late a private in Field's com-
23 pany, 40th reg't of infantry, a certain tract of land containing one hundred & sixty acres, being the northeast qr. of section eleven, of township ten north, in range one west, in the tract appropriated (by the acts aforesaid) for military bounties in the Territory of Illinois, to have and to hold the said quarter section of land, with the appurtenances thereof, unto the said Alonzo Redman, and to his heirs and assigns, forever.

In testimony whereof, I have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this seventh day of January, in the year of our Lord one thousand eight hundred and eighteen, and of the independence of the United States of America the forty-second.

[L. S.] J. M.

By the President:

J. M., *Commissioner of the General Land Office.*

GENERAL LAND OFFICE, *January 13th*, 1857.

In accordance with the seventh section of the act of Congress, approved the 4th of July, 1836, entitled "An act to reorganize the General Land Office," and with the act of Congress approved the 3d
24 of March, 1843, entitled "An act in relation to the exemplification of the records of land patents, and other evidences of title," and amendatory of the act entitled "An act to reorganize the General Land Office," I, Thomas A. Hendricks, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification of page 552, vol. 9, Illinois Bounty Land Records, on file in this office. The record of the patent in this case, of which the annexed is a literal exemplification as aforesaid, was omitted to be signed, as required by law, as appears from the record of the same in this office, but the 1st section of the act of March 3d, 1843, above referred to, provides that "where such exemplifications are adduced in evidence, they shall be deemed and held to be of the same validity in all proceedings, whether at law or in equity, as if the names of the officers signing and countersigning the same had been fully inserted in such record."

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, on the day and year first above written.

THOS. A. HENDRICKS,
Commissioner of the General Land Office.

[UNITED STATES GENERAL LAND OFFICE SEAL.]

25 *Deed from S. Rand to L. F. Stevens.*

Quit-claim.

This indenture, made this twenty-third day of June, in the year of our Lord one thousand eight hundred and fifty-four, witnesseth: That Sophia Rand, widow, (she being sister and heir-at-law of Alonzo Redmond, deceased, who was late a private in Captain Field's company of the fortieth regiment of infantry, in the war of eighteen hundred twelve and fourteen with Great Britain,) of the county of Franklin, and State of Maine, party of the first part, in consideration of the sum of one dollar cash in hand paid by Levi F. Stevens, of the county of Middlesex, and State of Massachusetts, party of the second part, the receipt of which is hereby acknowledged, do hereby release, grant, bargain, and quit-claim unto the said party of the second part, his heirs, and assigns, forever, all that certain tract of land situated in the tract appropriated for military bounties in the State of Illinois, for the war of 1812, and described as the northeast quarter of section No. eleven (11), in township No. ten (10) north, of range No. one (1) west of the fourth principal meridian, and being the tract granted by the United States of America
to Alonzo Redman, late a private in Capt. Field comp'y, in the
26 4th regiment of infantry, by letters patent bearing date of January 7th, 1818, and founded upon warrant No. 12,386, reference

being made to said patent will more fully appear; to have and to hold the said premises, with all the appurtenances thereto belonging, or in any wise appertaining, to the only proper use, benefit, and behoof of said party of the second part, his heirs, and assigns, forever.

In witness whereof, the said grantor has hereunto set her hand and seal the day and year first above written.

SOPHIA RAND. [SEAL.]

Signed, sealed, and delivered in presence of—
JAMES LOMBARD.
ZIPPORAH H. RAND.
THOMAS FRANKLIN RAND.

STATE OF MAINE, *Franklin County, ss:*

I, Henry E. Dyer, of New Sharon, a justice of the peace in and for said county, do hereby certify that Sophia Rand, of the county and State aforesaid, personally known to me as the same person whose name is subscribed to the within deed, appeared before me this day in person, and acknowledged that she signed, sealed, and delivered the said instrument of writing as her free and voluntary act and deed for
27 the uses and purposes therein set forth.

Given under my hand and seal this twenty-third day of June, A. D. 1854.

[SEAL.] HENRY E. DYER,
Justice of the Peace.

Proof of heirship.

STATE OF MAINE, *County of Franklin, ss:*

On this twenty-third day of June, A. D. 1854, personally appeared before me Henry E. Dyer, a justice of the peace in and for the county and State aforesaid, duly authorized to administer oaths, &c., Sophia Rand, to me personally known as a credible person, who, being duly sworn according to law, doth depose and say that she, the said deponent, was personally acquainted with Alonzo Redman, who was late a private in Capt. Field's company of the fortieth regiment of infantry, in the war of 1812 & '14 with Great Britain, and that said Redman was born in Monmouth, Kennebec County, Maine, on or about the year 1793, and that he left home more than 30 years ago, and has long since been supposed to be dead, they never having heard from him since he left home; and that she, the aforesaid deponent, is his sister and heir-at-law to his estate; and that the said Alonzo Redman was never married; and
28 that the above statement is strictly true to the best of her knowledge and belief.

In witness whereof, I have hereunto set my hand and seal the day and year first above written.

SOPHIA RAND. [SEAL.]

Sworn and subscribed to before me, Henry E. Dyer. In witness whereof, I have hereunto set my hand and affixed my hand and seal, this twenty-third day of June, A. D. 1854.

[SEAL.] HENRY E. DYER,
Justice of the Peace.

STATE OF MAINE, *Franklin County, ss:*

I, Isaac Tyler, clerk of all the judicial courts of said State within & for the county aforesaid, hereby certify that Henry E. Dyer, esquire,

before whom the annexed deed and affidavit were acknowledged, subscribed, & sworn to, was, at the date of his attestations thereto, a justice of the peace within and for said county, duly commissioned and qualified; and that the signatures thereto purporting to be his are genuine; and that said deed is acknowledged and executed agreeably to the laws of this State.

In witness whereof, I hereto set my hand and affix the seal of the supreme judicial court for said county, at Farmington, this twenty-third day of June, A. D. 1854.

[SEAL.] ISAAC TYLER, *Clerk.*

29 No. 12,525.

Filed July 10, 1854, & recorded in Warren County, Ill's, vol. 21, page 85, 86, & 87.

WM. BILLINGS, *Clk.*

Deed from L. F. Stevens to S. Smith.

This indenture, made this twenty-first day of April, in the year of our Lord one thousand eight hundred and fifty-five, between Levi F. Stevens, of the county of Suffolk, in the State of Massachusetts, of the first part, and Spencer Smith, of the city and county of St. Louis, in the State of Missouri, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of seven hundred dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released, sold, and forever quit-claimed, and by these presents doth remise, release, sell, and forever quit-claim unto the said party of the second part, and to his heirs and assigns, forever, all that tract or parcel of land situate, lying, and being in the county of Warren, in the State of Illinois, known and described as the northeast quarter of section numbered eleven, in township numbered ten north, of
30 range numbered one west of the fourth principal meridian, to have and to hold the above-described premises, with all the privileges and appurtenances thereunto belonging, to the party of the second part, his heirs, and assigns, forever.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

LEVI F. STEVENS. [SEAL.]

Signed, sealed, and delivered in presence of—

STATE OF ILLINOIS, *Peoria County:*

I, George S. Blakely, notary public for said county, do certify that on this day personally appeared before me, Levi F. Stevens, whose name appears subscribed to the foregoing deed of conveyance as having executed the same, and who is personally known to me to be the real person who and in whose name the acknowledgment is proposed to be made, and acknowledged the execution thereof as his voluntary act and deed, for the uses and purposes therein expressed; and , wife of the said , having been by me made acquainted with the contents of the said deed, and by me examined separate and apart from her said husband whether she had executed the same
31 and relinquished her dower to the lands and tenements therein mentioned, acknowledged that she had done so voluntarily and

freely, and without compulsion of her said husband, and does not wish to retract.

Given under my hand and seal of my office, at Peoria, this 21st day of April, A. D. 1855.

[SEAL.] GEORGE S. BLAKELY,
Notary Public.

No. 13,955.

STATE OF ILLINOIS,
Warren County, Recorder's Office:

I, William Billings, clerk of the circuit court in and for the county of Warren, in the State of Illinois, and ex officio recorder of deeds in said county, do hereby certify that the annexed deed was filed for record in my office on the 17th day of May, A. D. 1855, and has been duly recorded with the accompanying certificates in vol. 24, page 127, in said recorder's office.

In witness whereof, I hereunto set my hand and affix the seal of said circuit court, at my office in Monmouth, this 17th day of May, A. D. 1855.

[SEAL.] WM. BILLINGS,
Clerk and ex officio Recorder,
By H. C. MARK, *Dep'ty.*

32 The defendant then admitted that the parties in the former suit, in which said record was made, were the same, & the land in controversy in said former suit were also the same as in the present suit, but objected to the admission of said special verdict set out in bill of exceptions as evidence to the jury, which objection the court sustained, & excluded said verdict from the jury as evidence; to which ruling of the court the plaintiff then & there excepted & excepts. The plaintiff then rested. This was all the evidence in the case.

The court thereupon instructed the jury that the plaintiff had not made out his case by the necessary evidences.

To which ruling of the court the said plaintiff then & there excepted.

THOMAS DRUMMOND. [SEAL.]

(Endorsed:) Filed Feb'y 24th, 1868.

WM. H. BRADLEY, *Clk.*

33 On this day, to wit, the 17th day of July, A. D. 1868, came said plaintiff and filed in the said court with the clerk thereof his appeal bond in said entitled cause; which said bond is in the words and figures following, to wit:

Appeal bond.

Supreme Court of the United States.

SPENCER SMITH
vs.
HAMILTON J. MCCOOL.

Know all men by these presents, that we, Spencer Smith, George F. Harding, and Hezekiah M. Wead, are held and firmly bound unto the above-named Hamilton J. McCool in the sum of five hundred dollars, to be paid to the said Hamilton J. McCool, his executors, & administrators; to the payment of which, well & truly to be made, we bind ourselves &

each of us, and our heirs, executors, & administrators, firmly by these presents.

Sealed with our seals & dated this 4th day of June, A. D. 1868.

Whereas the above-named Spencer Smith has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the northern district of Illinois: Now, therefore,

34 the condition of this obligation is such, that if the above-named Spencer Smith shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; & otherwise the same shall be & remain in full force & effect.

SPENCER SMITH, [SEAL.]
By his attorney in fact, H. M. WEAD.
GEORGE F. HARDING. [SEAL.]
H. M. WEAD. [SEAL.]

Approved:

THOMAS DRUMMOND.

(Endorsed:) Filed July 17th, 1868.

WM. H. BRADLEY, *Clk.*

35 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing written matter, on pages numbered consecutively from one to thirty-four, inclusive, and the printed record inserted between pages twenty and twenty-one herein, to be a true, correct, and complete transcript of all the record of the proceedings of said court had in said court in said entitled cause, wherein Spencer Smith is plaintiff, and said Hamilton J. McCool is defendant, as the same appears of record remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office in the city of Chicago, in the district aforesaid, this fifth day of December, A. D. eighteen hundred and sixty-eight, and of the independence of the United States the ninety-third year.

[SEAL.] WILLIAM H. BRADLEY, *Clerk.*

[5-ct. int. rev. certificate, canceled: W. H. B., Dec'b. 5, 1868.]

36 Received a copy of citation issued in above-entitled cause in July , 1868, giving notice that a writ of error was sued out therein returnable to December term, A. D. 1868.

Dec. 9th, 1868.

37 Circuit court of the United States for the northern district of Illinois, ss.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Spencer Smith, plaintiff, and Hamilton J. McCool, defendant, a manifest error hath happened to the great damage of the said Spencer Smith, as by his complaint appears; and it being fit that the error, if any there

hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next in the said Supreme Court to be then and there held; that the record and proceedings being inspected, the said
38 Supreme Court may cause further to be done therein to correct that error what of right, and according to the law and custom of the United States, should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this sixth day of July, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the United States the ninety-third year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

39 To Hamilton J. McCool, greeting:

You are hereby cited & admonished to be & appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the United States for the 8th circuit & northern district of Illinois, wherein Spencer Smith is plaintiff, & you are defendant in error, to shew cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness this 14th day of July, A. D. 1868.

THOMAS DRUMMOND.

United States circuit court, northern district of Illinois.

DECEMBER 9, 1868.

George F. Harding, being sworn, says that he did, in July, 1868, serve the original citation issued in said case, of which the above is a true copy, upon Milton H. Peters, attorney for said Hamilton J. McCool, who tried said case in said court, by delivering to him a true copy thereof, and that said original is lost or mislaid.

Sworn to and subscribed before me December 9th, 1868.

GEO. F. HARDING.

(Indorsed:) Circuit court U. S., northern dist. Ill's. Spencer Smith vs. Hamilton J. McCool. Writ of error.

SUPREME COURT OF THE UNITED STATES.

No. 200.

SPENCER SMITH, PLAINTIFF IN ERROR,

vs.

HAMILTON J. McCOOL.

ADDITION TO RECORD AND STIPULATION OF COUNSEL.

FILED MARCH 26, 1870.

1 Supreme Court of United States, December term, A. D. 1869.

SPENCER SMITH
v.
HAMILTON J. MCCOOL.

It is stipulated that the following copy of the record in said cause was omitted by the clerk of the United States circuit court northern district of Illinois by mistake, in copying the record of said former case between said parties, offered in evidence on the trial of said case, viz:

2 Circuit court of the United States for the northern district of Illinois, sitting at the city of Chicago, in said district, of the July term, A. D. 1862.

FRIDAY, *July 18th, A. D.* 1862.

Present, the Hon. Thomas Drummond, judge.

SPENCER SMITH
v.
HAMILTON J. MCCOOL. } 1968.—Ejectment.

On mandate from Supreme Court.

Now comes the defendant, by Grimshaw & Williams, his attorneys, who file the mandate of the Supreme Court herein, reversing the judgment of this court of the date of July 14th, 1860, and directing that a judgment be entered herein for the said defendant on the special verdict of the jury herein.

It is thereupon considered and adjudged by the court that the defendant be discharged herein, and that he go hence without day, and that he have and recover of the plaintiff his costs and charges by him about his defence in this behalf expended, to be taxed, and also his costs in the Supreme Court as taxed, and that he have execution therefor.

3 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above & foregoing to be a true, correct, & complete copy from the record of the proceedings of said court of the order of said court, entered of record July 18th, A. D. 1862, in said entitled cause of Spencer Smith against Hamilton J. McCool, as the same appears of record remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office, in the city of Chicago, in said district, this 14th day of January, A. D. 1870, and of our independence the 94th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

4 And it is expressly stipulated that the same shall be held & treated as a part of said record, with the same force & effect as if said mistake had not occurred, & it now formed part of the original record of this case.

Jan. 14, 1870.

WEND & JOCK,
Att'ys for Pl'ff.
MILTON S. PETERS,
Att'y for Def't in Error.

(Indorsed:) Supreme Court U. S. 1869, Dec. term. No. 200. Smith, pl'ff in error, vs. McCool. Addition to record & stipulation of counsel. Filed 26 March, 1870.

Supreme Court of the United States.

DECEMBER TERM, 1869.

SPENCER SMITH, *Appellant*,

vs.

HAMILTON J. McCOOL, *Appellee.*

Appeal from the Circuit Court for the Northern District and Circuit of Illinois.

BRIEF FOR APPELLANT.

By H. M. WEAD, *of Illinois.*

Supreme Court of the United States.

DECEMBER TERM, 1869.

SPENCER SMITH, *Appellant*,

vs.

HAMILTON J. McCOOL, *Appellee.*

Appeal from the Circuit Court for the Northern District and Circuit of Illinois.

BRIEF FOR APPELLANT,

By H. M. WEAD, *of Illinois.*

This is an action of Ejectment commenced by Spencer Smith, Appellant, in the Circuit Court for the Northern District of Illinois, to recover a quarter section of land, in Warren County, Illinois, described as the N. E. 11, 10 N. 1 W. of the 4th Principal Meridian.

The action was commenced on the 28th day of November, A. D. 1862.

Before the commencement of this action, another action between the same parties, to recover the same tract of land, had been brought and prosecuted for many years, with various results, until it finally reached this Court, and was decided at the December Term, A. D. 1861, thereof, and is reported in 1st Black, page

459. McCool, defendant in the original action, and also defendant here, was appellant in that case, and this Court then reversed the decision of the Circuit Court, and ordered judgment to be entered for defendant upon the ground *that the suit was commenced before the plaintiff acquired his title.*

A mandate issued from this Court to the Circuit Court, commanding that Court to enter judgment as indicated in the decision, but when the case was re-docketed in the Circuit Court the plaintiff caused it to be dismissed, and afterwards commenced anew on the 28th Nov. 1862.

The former suit was commenced on the 2d of July, 1855, and this Court held that if *the plaintiff, Smith, had title to the premises, his title was not acquired until February*, 1857.

The first suit having been fully disposed of, a new one was commenced in 1862, and on the first trial thereof, in May, 1863, a verdict and judgment was rendered for the plaintiff—see Record, pages 3 and 4—and on the last trial thereof, a verdict and judgment was rendered for the defendant, because the Judge of the Circuit Court refused to receive in evidence, for any purpose, a special verdict and the judgment thereon of the jury empanneled to try the first case, which verdict ascertained and declared several specific facts important to both parties. These facts were settled and ascertained upon a full hearing of all the testimony, and were agreed to in the handwriting of the counsel for defendant, and were fully admitted and declared for the purpose of having them settled and established beyond all controversy.

The case was tried before Judge Drummond and a jury, on the 24th January, 1868. On the trial the plaintiff offered in evidence:

1st. Patent from the United States to Alonzo Redman, dated 7th January, 1818.

2d. Deed from Sophia Rand, mother and surviving heir of Alonzo Redman, to Levi F. Stevens, dated 23d June, 1854.

3d. Deed, Levi F. Stevens to Spencer Smith, 21st April, 1855.

4th. Special verdict rendered in the former trial, which finds all the material facts as to the pedigree of Alonzo Redman and his heirs, which it is necessary to know, and also the acts of the Legislature of the State of Illinois which control the case.

The Judge refused to let the special verdict be read in evidence for any purpose. The only question in the case arises from the refusal of the Judge to permit the special verdict to be read in evidence. The counsel for plaintiff contends:

I. That the defendant is ESTOPPED *from denying matters of fact which have been once put in issue between the parties* in relation to the same subject matter, and decided by a jury.

The verdict offered in evidence, set forth in detail the special facts found; upon these facts a judgment was pronounced by the Court, which judgment was reversed by this Court and a different one ordered to be entered, but no new trial was ordered, and the facts found by the jury remain unaltered, binding and forever conclusive between the parties. In support of this position the following cases are confidently relied on:

Outram vs. Morewood, 3 East., 353.
Burt vs. Sternburgh, 4 Cowen Rep., 559.
Gardner vs. Buckbee, 3 " " 120.
Marsh vs. Pier, 4 Rawle, 273.
Dennison vs. Hyde et. al., 6 Con. Rep., 508.
Gray vs. Pingry, 17 Vt. Rep., 419.
Perkins vs. Walker, 19 Vt. Rep., 144.

The verdict and judgment were offered by the plaintiff as an estoppel. The defendant is precluded from denying the facts found upon the former issue.

1st. The *subject matter* is the same.

2d. It is between the *same parties.*

3d. The *facts* were distinctly in issue, and were found by the jury.

4th. This all *appears by the record.*

5th. No exception was taken to the form of pleading the estoppel, nor can there be, since, by our statute in relation to ejectment, special pleading is abolished. The defendant admitted that the parties in the former suit were the same, and the land the same, as in this suit. (See Record, page 24.)

The *facts* found by the jury were as follows: "We, the jury, "find that the N. E. 11, 10 N., 1 W., the land mentioned in the "said declaration was, on the 7th day of June, 1818, duly granted "by the United States to Alonzo Redman for his military services "in the late war between the United States and Great Britain; "that said Redman was the illegitimate son of Polly Norris; that "said Polly Norris had three other illegitimate children, named "Elanor Fogg, Joseph Melcher, and Sophia Norton; that Elanor "Fogg died without issue in the year 1824; that Joseph Melcher "died without issue in the year 1814; that Alonzo Redman died "without issue in the year 1825; that Polly Norris died without

"any other issue than as above stated in the year 1837; that So-
"phia Norton married Reuben Rand in the year 1816; that Reu-
"ben Rand died in June, 1853; that Sophia Rand, on the 23d
"day of June, 1854, by her quitclaim deed of that date duly ex-
"ecuted, conveyed said land to one Levi F. Stevens; that said
"Stevens, on the 21st day of April, 1855, by his quitclaim deed
"of that date, duly conveyed said land to Spencer Smith, the
"plaintiff. That the General Assembly of the State of Illinois
"passed an act entitled 'An Act to amend an act concerning the
"descent of real property in this State,' approved February 12th,
"1853, which was approved by the Governor on the 16th day of
"February, 1857, which is in the words and figures following."
(The act is a *public* act, and is set forth in the Record, page 15, and in 1st Black, 459.)

By virtue of this act, and the finding of the jury, the title to the land was vested in the plaintiff.

No reason is perceived why the Court refused to receive the special verdict of the jury in evidence.

The verdict was not set aside, reversed, or annulled; on the contrary, judgment was had for defendant, and the verdict proved to be to his advantage, Can defendant, after judgment in his favor upon the special finding, be permitted to deny the verdict upon which that judgment is founded?

II. There was a motion for a new trial, which was overruled. It is laid down in Greenleaf's Evidence, sec. 538, "That the ver-
"dict and judgment in any case are always admissible *to prove*
"the fact *that the judgment was rendered*, or *the verdict given*;
"for there is a material difference between proving the existence
"of the record and its tenor, and using the record as the medium
"of proof of the matters of facts recited in it." The Court refused to let the verdict and judgment be read for *any purpose*. It seems to us not only proper proof, but very strong proof, of the birth, death, and marriage of the persons named in the verdict. If it was not *conclusive*, it was strongly *persuasive*. The verdict of twelve men, empanneled and sworn to enquire into the existence of particular facts in dispute, ought not to be treated with contempt.

Since this argument was written, an amended record has been filed with the Clerk, containing the correct order of the Circuit Court dismissing the first case; and a stipulation by counsel that the order was omitted in the first record by mistake.

H. M. WEAD.

IN THE

Supreme Court of the United States,

—

DECEMBER TERM, 1869.

—

SPENCER SMITH,
vs.
HAMILTON J. McCOOL.
} *Error to the Circuit Court of the Northern District of Illinois.*

Points, Authorities and Arguments for the Defendant in Error.

The sole and only question in the case is, whether the Circuit Court should have admitted as evidence to the jury, on the trial of the case below, the bill of Exception taken in a prior case, between the same parties, and in relation to the same land. Which said prior suit had been instituted in the same Court on the 1st day of May, A. D., 1855, and verdict and judgment were subsequently rendered in favor of the Plaintiff and against the Defendant. Afterwards the Defendant brought the judgment of the Circuit Court before this Court, and the judgment was reversed, and the case remanded, on the 24th day of March, 1861, with directions to the Circuit Court, to enter judgment for the Defendant, upon the special verdict set out in the bill of Exceptions.

The Circuit Court did so enter judgment in favor of the Defendant, in pursuance of the mandate of the Supreme Court, after which, on the 28th day of November, 1862, the same Plaintiff instituted this suit against the same Defendant, and for the same land. The verdict and judgment in the last case were also for the Defendant.

The Circuit Court upon the trial of the last case excluded from the jury, the bill of Exceptions taken on the former case, which recited that the jury found as facts certain things, which the Plaintiff wished to prove upon this trial by the recitations contained in the purported special verdict contained in the bill of Exceptions.

The Defendant objected to the admission in evidence of said bill of Exceptions, to prove the fact which the Plaintiff sought to establish upon this trial, to wit: that Sophia Rand, who conveyed to Levi F. Stevens, the grantor of the Plaintiff, was the sole and only heir of Alonzo Redman, the patentee, and Defendant objected to its admission for any purpose, as evidence to the jury in this case, and claimed that the Plaintiff should prove by testimony other than such statement in the said bill of Exceptions, that Sophia Rand was such heir of the patentee.

That the depositions taken in the former case to prove this were on file in this case, and that the Plaintiff could resort to them to prove this, together with such other proof as he might have, and the jury in this case should pass upon the sufficiency of such testimony, and that this jury were not bound by what the jury in the other case had found to be true.

That in that case, it was wholly immaterial, whether such were the facts or not, because even if they were, the plaintiff had no title to the premises in controversy, when he commenced his suit, and he must therefore fail any how.

This Circuit Court sustained the objections of the defendant's

Council, and excluded the bill of exceptions, as evidence to the Jury.

The Plaintiff introduced no evidence to prove that Sophia Rand was the heir of Alonzo Redman, and sought to introduce none other than the bill of exceptions, although he had all the evidence that he had used on the trial of the former case.

But the evidence would not prove such heirship, and therefore he did not offer it, although by the agreement of the parties, and the order of the Circuit Court, the depositions heretofore taken, and filed in the former case, were to be used, upon the trial of this case.

And now for the first time, such evidence became important, as since the commencement of this first suit, the legislature of the State of Illinois had invested illegitimates, with the rights of inheritance, whether they had died before or after the passage of the law of 1853, which act first conferred upon illegitimates such right of inheritance.

In the present suit, it was important to know whether Sophia Rand was the sole and only heir of Alonzo Redman, the patentee.

The burden of proof was upon the plaintiff, which he did not attempt to establish by the evidence, but sought to introduce said bill of exceptions, to estop the Defendant from denying the same. Because forsooth, in the former trial, a Jury had so formed, when the Defendant had no cause to question it as the Plaintiff had then no title whatever.

But now that it was the interest of the defendant to question this, and subject the plaintiff to furnish the evidence of such heirship, the Plaintiff dare not attempt to introduce such evidence, as his evidence was entirely insufficient.

But seeks to deprive Defendant of his property and legal rights by what he claims to be a technical estoppel.

I insist that the purported special verdict contained in the bill of Exceptions was inadmissable, because:

FIRST.—That in fact *no special verdict had ever been rendered.* The Court record shows only a general verdict. The special verdict appeared nowhere except in the bill of exceptions.

That by the bill of Exceptions certain facts were assumed to have been found by the jury for the purposes of the trial of that case, to have the opinion of the Court upon the law arising upon such assumed state of facts.

That the case is none other and not different than had the bill of Exceptions been in the ordinary form, stating that the same facts had been proved to the jury; upon the record was entered a general verdict, and that there was any special verdict *alone appears in the bill of Exceptions*, upon which the finding of the Circuit Court was reversed. Where a demurrer is filed to a pleading, the opposite party could with like reason, claim that the party filing such demurrer could not afterwards contest the acts set up in the pleading demurred to.

A demurrer, like this special verdict, for the purpose of obtaining the decision of the Court upon the law arising upon the facts alleged in the pleading, *admits the facts to be as therein stated.*

SECOND.—If the verdict was admissable, then also the judgment of the Supreme Court thereon must have been also admitted, which was that the Plaintiff had no right of recovery, consequently the Plaintiff suffered no injury from the refusal of the Court, to admit the alleged special verdict.

A verdict is not evidence without producing the judgment or a copy, for it may have been arrested.

1 Starkie, 297.

A judgment or decree can not be used as evidence by one party, unless the same use may be made by the other party, or where an opposite decision would be evidence for him.

Phillips *vs.* Thompson, 3 Stewart & Porter, 369.

The better opinion is that a verdict without the judgment is inadmissable, to prove the issues found by it.

6 Texas, 60.

THIRD.—If this be a special verdict, it would prove that the issue had been found by the jury, that the Defendant was guilty of the unlawful detention of the premises claimed by the Plaintiff.

The statement therein contained that certain facts had been found by the jury, could not be used to prove that such were the facts in the present case.

A verdict and judgment is conclusive as to the issue presented by the pleadings, but is not evidence to establish in another case the same facts, that were proved upon the former trial to maintain the issue and authorize such finding.

It is, however, necessary in order to constitute an estoppel by a former judgment, that the precise point which is to create the estoppel, should have been put in issue and decided, and this must appear from the record alone.

1 Starkie, 264. Smith *vs.* Sheenore, 4 Coun. 276.

A former verdict and judgment is only conclusive so far as the questions *were raised by the pleadings and issues thereon taken*, and is no evidence as to collateral matters involved in said suit.

Hobbs *vs.* Parker, 31 Maine, 143.

The verdict and judgment are only conclusive, as to the matter in issue. By the matter in issue is understood to be that matter for which the Plaintiff proceeds by his action, and the Defendant controverts by his pleadings.

Facts offered in evidence, to establish the matters which are in issue, are not themselves in issue, within the meaning of the rule, although they may be contested upon the trial.

King *vs.* Chase, 15 N. H., 9.

In a suit for land against two persons jointly, certain facts were admitted in evidence, and agreed upon by the parties.

In a subsequent suit for the same lands, between the same Defendants, this admission, though in writing, cannot be received in evidence.

Frye *vs.* Gregg, 35 Maine, (5 Redfield) 29.

The judgment cannot be used as evidence to anything incidently coming in question in a former suit.

Leatz *vs.* Wallace, 17 Penn., (5 Harris,) 412.

A judgment between the parties is admissable only to matters directly adjudicated, and within the cognizance of the Court pronouncing judgment, not to collateral points incidentally arising in the course of judicial proeeedings.

Minor *vs.* Walton, 17 Mass., 236.

FOURTH.—The issue in the two suits are not the same, and if not, neither the verdict or the judgment would be admissable in this case.

The question tried and determined in the first case was whether the Plaintiff on the *first day of May, 1855*, the time of the com-

mencement of the first suit, was seized in fee simple of the premises in controversy, and whether Defendant was guilty of an unlawful detention.

The question determined in the second suit was whether at the time of the commencement of that suit, on the 28th day of November, A. D. 1862, the Plaintiff was then seized in fee simple of said premises, and the Defendant was guilty of such unlawful detention.

The title of the Plaintiff in the second suit *was acquired subsequent to the commencement* of the first suit.

Whatever title the Plaintiff had, *was acquired by the Act* of Legislature of the State of Illinois, approved February 16, 1857.

The same fact should have been in issue in the former case.

1 Starkie, 262.

The judgment must be directly on the point.

1 Starkie, 256.

In order that a former judgment may be pleaded in bar, it must appear from the record.

That the cause of action is the same as in the former suit.

Jones *vs.* Fales, 4 Mass., 245.

A former judgment cannot be pleaded in bar, unless it was directly upon the same point.

6 Rand, 86 and 157.

It seems that this will depend whether the same evidence will support both actions.

Gates *vs.* Gorham, 5 Vermont, 317.

A verdict to be a bar or estoppel must be direct upon the very point in issue.

Mallett *vs.* Foxcraft, 1 Story, 474.

A previous adjudication between the same parties, in regard to the same property, is not admissable in a second suit, when the second case is in regard to a *title acquired since the commencement of the prior suit.*

McKissick *vs.* McKissick, 6 Humphrey, Rep. 95.

FIFTH.—The Plaintiff suffered no injury because of the exclusion of the record of the special verdict, because the facts, if as there found, showed that the title of Sophia Rand, under which the Plaintiff claimed to hold (if any there were), was not vested in the Plaintiff, and he had no right of recovery, her *quit claim deed* to Levi F. Stevens, the grantor of the Plaintiff, was executed June 23rd, 1854, while her title, if any, was acquired by said act of February 16, 1857.

The Legislature, though they could and did invest her with the title of the State of Illinois, could *not divest her of it without her consent.*

SIXTH.—Farther, the Plaintiff sustained no injury from the exclusion of such alleged special verdict, because the facts as therein stated showed that the Plaintiff's right of action, if any, was barred by the statute of limitations of the State of Illinois.

Defendant having had possession and actual occupancy, under claim and color of title for more than seven years before the commencement of the suit, and had paid all the taxes.

In this case the merits and justice are wholly with the Defendant. He bought the land in April, 1847, and immediately took possession, and has improved and occupied the same ever since, a period of 23 years, as his homestead, under color of title made in good faith and has paid all the taxes.

For the last fifteen years this Plaintiff has by an unfounded and inequitable claim of title, sought to deprive the defendant of his homestead.

The decisions of this Court and of the Circuit Court has been in favor of the Defendant, and still the Plaintiff, (or rather the Attorneys for the Plaintiff who have, during all that time carried on the litigation in the name of the Plaintiff,) will not cease the pursuit of the Defendant's land to deprive him of the same.

They abandoned all hope of obtaining this land, upon the merits of their case.

But seek now to succeed by what they claim to be a technical estoppel, to prelude any investigation of the merits of their claim, and have Defendant's land adjudged to Plaintiff, on an alleged technicality absurd and unreasonable.

It remains to be seen whether the Plaintiff, after having failed upon the merits of his claim, can now obtain the homestead of the Defendant, on an alleged technicality that has no color of reason or justice.

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January 23, 1870.